STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2014
v	No. 313053 Ottawa Circuit Court
GARY DALE KLUSTY, Defendant-Appellant.	LC No. 10-034264-FH

Before: BOONSTRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of third-degree home invasion, MCL 750.110a(4), and stalking, MCL 750.411h. The trial court sentenced defendant to 180 days in jail with credit for 39 days and to 60 months' probation for each conviction, to be served concurrently. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant and the victim began a dating relationship in 2008, and defendant moved into the victim's home in April or May of 2009. Defendant did not enter into a lease with the victim and did not pay rent or pay for utilities. The victim provided defendant with a key (which only worked on the door leading into the home from inside the garage) and a garage door opener. In July 2009, the relationship ended, and the victim asked defendant to move out of her home. Over the course of a few days, defendant did so, removing his belongings but failing to return the key. The next week, while the victim was out of town, defendant entered the home to take a dishwasher, the ownership of which was in dispute between the two. While the method of entry was in dispute, defendant acknowledged entering the victim's home. Defendant claimed that he thought he had permission to enter the home after an alleged telephone call with an unnamed officer at the sheriff's office. At trial, defendant's attorney attempted to argue that defendant thought he had permission to enter the home and therefore did not commit the crime of home invasion.

After defendant was convicted, he timely filed a motion for a new trial or evidentiary hearing, arguing that trial counsel should have argued that defendant had a tenancy interest in the property, which would have meant that he was allowed to be in the home. Further, trial counsel should have introduced an expert to establish that defendant had a tenancy interest in the property. Defendant argued that because of trial counsel's conduct, he was denied effective

assistance of counsel. The trial court denied his motion, ruling that based on the facts presented at trial, defendant did not have a tenancy interest in the property; therefore, trial counsel did not provide ineffective assistance by failing to make this argument.

II. STANDARD OF REVIEW

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings are reviewed for clear error, and questions of "constitutional law are reviewed de novo." *Id*. (citations omitted). "[B]ecause the trial court did not hold an evidentiary hearing, our review is limited to the facts on record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

III. ANALYSIS

Defendant argues on appeal that trial counsel was ineffective. We disagree. Defendant first argues that his trial counsel should have argued that defendant had a tenancy interest in the property; therefore, defendant had permission to enter the victim's home. However, defendant has not demonstrated on appeal that he had a tenancy interest and thus, has not met his burden of showing that counsel's performance was deficient in failing to raise the issue. *Pickens*, 446 Mich at 338. To the contrary, the record supports the trial court's conclusion that there was no tenancy. "A tenant has exclusive legal possession and control of the premises against the owner for the term of his leasehold," and "a guest is a mere licensee and only has a right to use of the premises he occupies, subject to the proprietor's retention of control and right of access." See *Ann Arbor Tenants Union v Ann Arbor YMCA*, 229 Mich App 431, 438; 581 NW2d 794 (1998) ("It is this latter characteristic of exclusive possession and control of the premises--one that lies in the character of the possession--that is the fundamental criteria in distinguishing between a tenant and a guest.").

In this case, defendant never paid rent, never signed or had a lease agreement with the victim, and never paid for utilities. Defendant had a garage door opener and a key that only worked on the door leading into the home from inside the garage. Defendant did not have "exclusive legal possession and control of the premises against the owner for the term of his leasehold." *Ann Arbor Tenants Union*, 229 Mich App at 443. The record evidence does not support the conclusion that defendant had a tenancy interest in the property, and the trial court's finding to the contrary was not clear error. Thus, trial counsel's failure to argue that defendant had a tenancy interest was not objectively unreasonable because the argument is without merit, and counsel accordingly provided effective assistance. *Pickens*, 446 Mich at 338; *People v*

Ericksen, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

Defendant next argues that trial counsel "could have at least presented the facts of some kind of constructive tenancy to the jury." This argument is wholly abandoned by its cursory treatment and lack of citation to authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2011). Further, we find no authority to support the establishment of a "constructive tenancy" for the purpose of defending against a charge of home invasion. Trial counsel's failure to argue this theory was not objectively unreasonable because "[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *Ericksen*, 288 Mich App at 201.

Finally, defendant argues that trial counsel was ineffective for not introducing an expert witness on tenancy or eviction law. Decisions "whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *Id*. Moreover, "expert witnesses may not testify with regard to domestic law because it is within the exclusive responsibility of the trial judge to find and interpret the applicable law." See *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 704; 513 NW2d 230 (1994).

Defendant does not, on appeal, provide the name of an expert who would have testified favorably at his trial. Defendant has thus failed to establish the factual predicate of his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Further, for the reasons stated above, counsel's failure to introduce an expert witness on tenancy or eviction law did not deprive defendant of a "substantial defense." *Pickens*, 446 Mich at 338; *Dixon*, 263 Mich App at 398; *Ericksen*, 288 Mich App at 201. There was no evidentiary basis for a claim of tenancy, and an expert witness could have offered no pertinent testimony to establish a basis for such a claim. Thus, trial counsel's failure to call an expert witness was not objectively unreasonable. *Pickens*, 446 Mich at 338.

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ /E. Thomas Fitzgerald